

***United States Court of Appeals  
for the Second Circuit***



**RESPONDENT'S  
BRIEF**



*high affidavit*

# 74-2687

To be argued by  
MARY P. MAGUIRE

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**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**  
Docket No. 74-2687

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CANDIDO PEREIRA-BARREIRA,  
*Petitioner,*

—v.—

UNITED STATES DEPARTMENT OF JUSTICE  
IMMIGRATION AND NATURALIZATION SERVICE,  
*Respondent.*

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PETITION FOR REVIEW OF AN ORDER OF THE  
BOARD OF IMMIGRATION APPEALS

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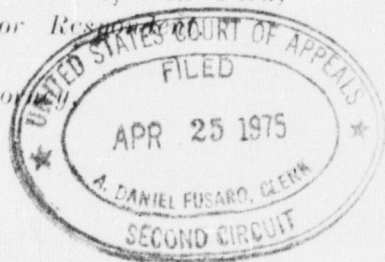
**RESPONDENT'S BRIEF**

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## TABLE OF CONTENTS

	PAGE
Issue Presented .....	1
Statement of the Case .....	1
Statement of the Facts .....	2
Relevant Statute .....	5
ARGUMENT:	
The waiver provisions of Section 241(f) of the Im- migration and Nationality Act are not available to petitioner, who was charged with being deport- able pursuant to the provisions of Section 241(a) (2) of the Act. ....	6
CONCLUSION .....	8

### TABLE OF CASES

<i>Reid v. Immigration and Naturalization Service</i> , 43 U.S.L.W. 4387 (U.S., March 18, 1975) .....	6
<i>Cf. Constanzo v. Tillinghast</i> , 287 U.S. 341, 343 (1932) ....	7
<i>Reid v. United States, supra</i> , slip. op at 11-12. ....	8



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**RESPONDENT'S BRIEF**

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**Issue Presented**

Is the statutory waiver of deportability contained in Section 241(f) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1251(f), inapplicable to an alien who entered this country as a nonimmigrant and who has been found deportable on a charge that he remained in the United States for a longer time than permitted, Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)?

**Statement of the Case**

The petitioner, Candido Pereira-Barreira (Barreira) petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals on November 13, 1974. In that order the Board held that Barreira was deportable under Section 241(a)(2) of the Immigra-

tion and Nationality Act (the "Act"), 8 U.S.C. § 1251(a) (2), as an alien who had remained for a longer period than authorized under Section 214(a) of the Act, 8 U.S.C. § 1184, and held further that the statutory waiver of deportation contained in Section 241(f) of the Act, 8 U.S.C. § 1251(f), did not apply to him.

Barreira conceded that he entered this country as a nonimmigrant visitor on July 18, 1968 (Petitioner's Brief, p. 2). He contends, however, that because his adjustment of status to that of a lawful permanent resident on December 14, 1970 was subsequently rescinded by the Immigration and Naturalization Service (the "Service") for fraud, his deportation is prohibited by Section 241(f) of the Act, 8 U.S.C. § 1251(f).

This Court has jurisdiction under Section 106 of the Act, 8 U.S.C. § 1105a.

### **Statement of the Facts**

Candido Pereira-Barreira (Barreira) is a 35 year old alien, a native and citizen of Portugal. He entered the United States on July 18, 1968 as a nonimmigrant visitor for pleasure, authorized to remain until October 1, 1968. Barreira failed to depart by that date and on October 17, 1968 deportation proceedings were instituted against him by the issuance of an order to show cause and notice of hearing. At a deportation hearing held on November 12, 1968 Barreira was found deportable as an overstay visitor and was granted the privilege of voluntary departure to February 1, 1969. An alternate order of deportation to Portugal was entered in the event Barreira failed to depart by the prescribed date.

During the pendency of Barreira's appeal from the deportation order, a sixth preference visa petition of which Bar-

reira was the beneficiary was approved pursuant to Section 204(b) of the Act, 8 U.S.C. § 1154(b), and Barreira moved to reopen the deportation proceedings in order to apply for adjustment of status to that of a permanent resident alien.

On December 14, 1970, in the course of a reopened deportation hearing, Barreira was granted an adjustment of status to that of a permanent resident pursuant to Section 245 of the Act, 8 U.S.C. § 1255. Subsequent investigation by the Service established that the documents submitted in evidence to support the sixth preference visa petition were fraudulent and that Barreira did not engage in the employment specified in the petition. By letter dated June 7, 1972 (T. 20)\* Barreira was advised that the Service intended to rescind his adjustment of status since the Service had determined that he was not eligible for such adjustment of status. Neither Barreira nor his attorney responded to the rescission notice within the time specified and by letter dated July 11, 1972 the Service rescinded Barreira's status as a lawful permanent resident pursuant to 8 C.F.R. 246.2 (T. 19). Barreira was granted voluntary departure until July 26, 1972.

Barreira failed to depart by the prescribed date and deportation proceedings were again instituted against him. However, on May 22, 1972 Barreira secured a Nevada divorce from the wife he had left in Portugal and, on the same date, married a lawful permanent resident. Since Barreira was married to a lawful permanent resident who filed a visa petition to accord him second preference status pursuant to Section 203(a)(2), 8 U.S.C. § 1153(a)(2), the deportation proceeding was terminated. The visa petition was approved on October 11, 1972 (T. 23) and Barreira again applied for adjustment of status pursuant to Section

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\* References preceded by the letter "T" are to the tabs affixed to the Certified Administrative Record filed with the Court.

245 of the Act, 8 U.S.C. § 1255 (T. 22). The application was denied by the Service as a matter of discretion on January 30, 1973 and Barreira was again granted the privilege of voluntary departure to February 14, 1973 (T. 21).

On December 5, 1973 Barreira's wife withdrew the visa petition of which Barreira was the beneficiary and on December 13, 1973 deportation proceedings were again instituted against Barreira by the issuance of an order to show cause and notice of hearing (T. 16). Barreira was charged with being deportable pursuant to Section 241 (a)(2) of the Act, 8 U.S.C. § 1251(a)(2), as a nonimmigrant who had remained in the United States after February 14, 1973 without authority. At the deportation hearing held on January 22, 1974 Barreira admitted the factual allegations in the order to show cause and the Immigration Judge found Barreira deportable as charged. Barreira was again granted the privilege of voluntary departure to April 1, 1974 and an alternate order of deportation to Portugal was entered in the event he failed to depart by that date (T. 13). Barreira, who was represented by counsel, did not appeal from the Immigration Judge's order and he failed to depart by April 1, 1974.

Instead, on April 18, 1974 Barreira filed a motion to reopen the deportation proceedings for reinstatement of voluntary departure and for a stay of deportation (T. 9). By an order dated May 7, 1974 the Immigration Judge denied Barreira's motion (T. 10) and on May 20, 1974 Barreira appealed to the Board of Immigration Appeals (T. 8). On that appeal, Barreira first sought relief from deportation pursuant to Section 241(f) of the Act since he had two citizen children born of his second marriage. By order dated November 13, 1974 the Board dismissed the appeal but again granted Barreira the opportunity to voluntarily depart within thirty days (T. 4). Barreira again failed to avail himself of the privilege of voluntary departure and on December 14, 1974 the Service issued a warrant



for his deportation (T. 2). By letter dated December 17, 1974 Barreira was notified to surrender for deportation on December 26, 1974 (T. 1). Barreira failed to surrender and on December 27, 1974 this petition for review was filed.

### Relevant Statute

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 241, 8 U.S.C. § 1251:

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who——

\* \* \* \* \*

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

\* \* \* \* \*

(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

## ARGUMENT

**The waiver provisions of Section 241(f) of the Immigration and Nationality Act are not available to petitioner, who was charged with being deportable pursuant to the provisions of Section 241(a) (2) of the Act.**

Petitioner contends that, as the parent of two United States citizen children, he is entitled to the waiver of deportability provided for in Section 241(f) of the Act, 8 U.S.C. § 1251(f). In view of the Supreme Court's recent decision in *Reid v. Immigration and Naturalization Service*, 43 U.S.L.W. 4387 (U.S., March 18, 1975), the petitioner's contention is without merit and cannot be sustained.

In the *Reid* case, the Supreme Court held that aliens who are deportable under Section 241(a)(2) of the Act are not entitled to the benefits of Section 241(f) of the Act. In *Reid*, the aliens, husband and wife, had entered the United States without inspection by falsely representing themselves to be citizens of the United States. Subsequent to their entry the aliens became the parents of two children born in the United States and citizens thereof. The Service instituted deportation proceedings against the alien parents and charged them with being deportable pursuant to Section 241(a)(2) of the Immigration and Nationality Act as aliens who had entered the United States without inspection. The aliens conceded that they were deportable as charged but argued that, as parents of citizen children, they were entitled to the benefits of Section 241(f).

In its opinion, the Supreme Court unequivocally stated:

“ . . . the ‘explicit language’ of § 241(f), upon which petitioners rely, waives deportation for aliens who are ‘excludable at the time of entry’ by reason of

the fraud specified in § 212(a)(19), and for that reason deportable under the provisions of § 241(a)(1). If the INS were seeking to deport petitioners on this ground, they would be entitled to have applied to them the provisions of § 241(f) because of the birth of their children after entry.

But the INS in this case does not rely on § 212(a)(19), nor indeed on any of the other grounds for *excludability* under § 212, which are in turn made grounds for *deportation* by the language of § 241(a)(1). It is instead relying on the separate provision of § 241(a)(2), which does not depend in any way upon the fact that an alien was excludable at the time of his entry on one of the grounds specified in § 212(a). Section 241(a)(2) establishes . . . a separate ground for deportation, quite independently of whether the alien was excludable at the time of his arrival. . . . If this ground is established by the admitted facts, nothing in the waiver provision of § 241(f), which by its terms grants relief against deportation of aliens on the ground that they were excludable at the time of entry, has any bearing on the case. *Cf. Constanzo v. Tillinghast*, 287 U.S. 341, 343 (1932)." (Slip opinion at 4)

Barreira was charged with being deportable pursuant to Section 241(a)(2) of the Act as an alien who remained in the United States beyond the period of his authorized stay. Like the aliens in *Reid*, Barreira was found deportable on a ground which in no way depended upon the fact that he was excludable at the time of his entry on one of the grounds specified in § 212(a), 8 U.S.C. § 1182(a), let alone under the provisions of § 212(a)(19) which would trigger the waiver provisions of § 241(f) under *Reid*. Barreira was found deportable solely on the charge that he had remained in the United States without authority sub-



sequent to February 14, 1973.<sup>1</sup> Barreira's counsel conceded in the course of the deportation hearing that Barreira was present in the United States without the consent of the Service. Since Barreira's deportability pursuant to Section 241(a)(2) of the Act was sustained, he is clearly not entitled to the benefit of Section 241(f) of the Act.

### CONCLUSION

**The petition for review should be dismissed.**

Respectfully submitted,

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Southern District of New York,  
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STEVEN J. GLASSMAN,  
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Of Counsel.*

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<sup>1</sup> Barreira's contention that the Service relied on his fraud in securing his adjustment of status as a basis for the deportation charge patently ignores the deportation charge found in the Order to Show Cause (T. 16). Contrary to Barreira's contention, the deportation charge was based on Barreira's unauthorized stay in the United States subsequent to February 14, 1973. The Service did not seek to "relitigate" the deportation charge of the 1970 proceedings, *i.e.*, overstay of the October 1, 1968 date authorized at the time of Barreira's entry. Further, such fraud would not accord Barreira any new rights under § 241(f). *Reid v. United States*, *supra*, slip. op at 11-12.

AFFIDAVIT OF MAILING

State of New York     )  
County of New York    ) ss

PAULINE P. TROIA,                   being duly sworn,  
deposes and says that he is employed in the Office of the  
United States Attorney for the Southern District of New York.

That on the 25th day of  
April 1975 s he served a copy of the within  
govt's brief  
by placing the same in a properly postpaid franked envelope  
addressed:

John A. Arcudi, Esq.,  
285 Golden Hill St.  
Bridgeport, Conn. 06604

And deponent further says  
s he sealed the said envelope and placed the same in the  
mail chute drop for mailing in the United States Courthouse,  
Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

25th day of April 19 75

Walter G. Brannon

WALTER G. BRANNON  
Notary Public, State of New York  
No. 24-0394500  
Qualified in Kings County  
Cert. filed in New York County  
Term Expires March 30, 1977